

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: THOMAS CARR, Petitioner, v. UNITED STATES.
CASE NO: No. 08-1301
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1 P R O C E E D I N G S

2 (10:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 08-1301, Carr v.
5 United States.

6 Mr. Rothfeld.

7 ORAL ARGUMENT OF CHARLES A. ROTHFELD

8 ON BEHALF OF THE PETITIONER

9 MR. ROTHFELD: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 When Congress uses ordinary words in the
12 statute, those words should get their ordinary meaning.
13 In SORNA, the Sex Offender Registration and Notification
14 Act, Congress did use ordinary words, and it used them
15 in an ordinary way. But the government proposes that
16 those words be given a most extraordinary reading. It
17 suggests that Congress wrote one of the elements of
18 SORNA's criminal offense in a sort of shorthand, and it
19 should be taken to mean something quite different than
20 what Congress actually said. It proposes --

21 JUSTICE ALITO: Mr. Rothfeld, I wondered if
22 I could ask you about three interrelated points
23 concerning your textual argument. And if I could just
24 lay those on the table and get your reaction to them, I
25 would appreciate it.

1 The first is that it appears that there is a
2 pretty universally accepted modern legislative drafting
3 convention that statutes should be phrased in the
4 present tense. The Senate drafting manual, for example,
5 says: Always use the present tense unless the
6 provision addresses only the past, the future, or a
7 sequence of events that requires use of a different
8 tense. And the House manual is to the same effect.

9 The second is that when the section that's
10 involved here, 2250, was drafted, the drafters didn't
11 know whether SORNA would apply to pre-SORNA sex offense
12 convictions. That was left up to the Attorney General.
13 And so when they were drafting this, they had -- it was
14 natural, perhaps, for them not to make a special
15 provision for the possibility that there might be some
16 pre-SORNA conduct involved. If the Attorney General had
17 determined that only post-SORNA convictions would qualify,
18 then only -- then the only travel that would qualify would
19 be -- would be post-SORNA travel. It was only when the
20 Attorney General decided that pre-SORNA convictions
21 could qualify that the question that's presented here
22 became a possibility.

23 And the third is that once the Attorney
24 General decided that SORNA would apply to pre-SORNA sex
25 offense convictions, that necessarily meant that conduct

1 constituting a -- a SORNA -- constituting a qualifying
2 sex offense could occur in the past. And yet there are
3 at least four provisions of SORNA that refer to the
4 conduct that constitutes a sex offense and uses only the
5 present tense, although in those instances it seems that
6 those provisions have to be read as also covering past
7 conduct, pre-SORNA conduct.

8 These are all in 42 U.S.C. 16911, which is
9 reproduced -- the relevant provisions are on 3a to 3-6
10 of the government's brief. I'll just mention a couple of
11 them to provide a flavor for this. Under 42 U.S.C. section
12 16911(3)(C), on 3a of the government's brief, an offense may
13 qualify as a tier II offense if, among other things, it,
14 quote, "occurs after the offender becomes a tier I sex
15 offender." But there "occurs" and "becomes" have to be
16 read as applying to past conduct.

17 42 U.S.C. 1691(4) on the same page says that
18 an offense may qualify as a tier III offense if, among
19 other things, it involves a kidnapping of a minor. But
20 "involves" there has to mean also "involved."

21 And the other two are subsection (7) on 5a
22 and subsection (8) on 6a.

23 So I wondered if you could comment on that.
24 Maybe you have a reaction to it.

25 MR. ROTHFELD: Well, I'll try to keep

1 straight each of the parts of the question. A couple of
2 reactions.

3 First of all, I think that the ordinary
4 assumption is that when the present tense is used in a
5 statute that's creating a criminal offense, it refers to
6 conduct that takes place after the statute was enacted.
7 We are not aware of and the government has not cited any
8 decision of this Court in which it has interpreted a
9 present tense verb used in a criminal statute as
10 attaching criminal consequences to conduct that took
11 place before the Act -- before the statute was enacted.

12 But before delving too deeply into the
13 present tense question, I think it's helpful to take a
14 look at how that fits into the other elements of the SORNA
15 criminal offense, because there are a number of things
16 about the statutory language that we think compel the
17 conclusion that Congress had in mind only the attachment
18 of criminal consequences to travel that took place after
19 SORNA was enacted.

20 For example, and to begin with, the first
21 element of the offense, which provides that the
22 defendant is required to register under SORNA, the
23 government says, and we agree, that the elements of the
24 SORNA offense have to be read sequentially so that the
25 defendant is guilty only if he or she commits them in

1 order.

2 The first element, as I said, the
3 statutory text, is "is required to register" under SORNA.
4 And it seems undeniable that a defendant is not and
5 cannot possibly be required to register under SORNA
6 until SORNA is enacted and is on the books. And that is
7 enough to dispose of this case because, as the
8 government agrees, the elements are sequential. The
9 first element is that there is a requirement to register
10 under SORNA.

11 The second element, the travel in interstate
12 commerce, has to follow the first element. The travel,
13 therefore, must follow the enactment of SORNA. That we
14 think is sufficient to dispose of this case. The
15 government's answer to that point is to say -- really,
16 to candidly acknowledge that the statutory language has
17 to be rewritten if they're to prevail. They say when
18 Congress said "is required" --

19 JUSTICE GINSBURG: Mr. Rothfeld, would you
20 clarify one thing? You're not questioning the Attorney
21 General's determination that the underlying sex offense
22 can have occurred pre-SORNA?

23 MR. ROTHFELD: We are not questioning that.
24 Congress specifically authorized in SORNA that the
25 Attorney General had the authority to designate

1 pre-SORNA offenses as triggering the registration
2 requirement.

3 CHIEF JUSTICE ROBERTS: Is that -- that's
4 pretty unusual, isn't it, to have Congress say it's up
5 to the Attorney General whether their laws apply
6 prospectively or retroactively or --

7 MR. ROTHFELD: It -- it certainly is unusual.
8 I think it's not for us to comment on whether that was a
9 sensible thing for them to do. But we don't dispute
10 here that -- that Congress did it and that the Attorney
11 General was authorized to do what he did. But --

12 JUSTICE SCALIA: Well, it's not as though he
13 was authorized to make something a crime which wasn't --
14 which wasn't a crime.

15 MR. ROTHFELD: That's absolutely right,
16 Justice Scalia, and I think --

17 JUSTICE SCALIA: He was authorized to say
18 you have to register.

19 MR. ROTHFELD: It's -- it's actually quite
20 helpful to our argument in this case that Congress was
21 aware of how to confer retroactive authority on the
22 Attorney General for some things, which it did, the
23 designation of pre-SORNA sex offenses as triggering
24 the registration requirement.

25 JUSTICE ALITO: I thought that the sequence

1 argument that the government was making was that the
2 events have to occur in this sequence: the conviction,
3 the interstate travel, and the failure to register.

4 MR. ROTHFELD: That is their argument. But
5 the way that they reach that conclusion is to say that
6 the first element of the offense, which is "is required
7 to register" under SORNA, was really a shorthand by
8 which Congress meant "committed a sex offense" that
9 Congress --

10 JUSTICE ALITO: Well, they might be wrong
11 on that. And I understood that you agreed that the
12 interstate travel has to take effect -- has to occur
13 after the sex offense conviction. It wouldn't --
14 you couldn't violate -- you wouldn't violate SORNA if
15 there's interstate travel, then the conviction, and
16 then the failure to register.

17 MR. ROTHFELD: We -- we agree, but I
18 think -- we do not agree, obviously, with the
19 government's understanding of the first element of the
20 offense. It's not that the sex offense took place.
21 It's that the SORNA registration requirement attached.

22 JUSTICE SCALIA: You -- you're saying it has
23 to take place not just after the offense, but after the
24 obligation to register.

25 MR. ROTHFELD: That's absolutely right.

1 JUSTICE SCALIA: Which is what the statute
2 says.

3 MR. ROTHFELD: Which is what the statute
4 says. And, again, the government's only attempt to
5 answer that point is to say that Congress actual meant
6 something different when it wrote the first element of
7 the offense.

8 JUSTICE ALITO: Well, but they might be
9 wrong that the sequence -- that the way these set out --
10 are set out in the statute dictates a temporal
11 sequence --

12 MR. ROTHFELD: They --

13 JUSTICE ALITO: -- that you can argue that
14 the temporal sequence that's necessary -- conviction,
15 travel, failure to register -- follows from the purpose
16 of this provision, which is to catch people who, after
17 having committing a sex offense and being convicted of a
18 sex offense in State A, move to State B. It would
19 follow from the purpose of the statute, not necessarily
20 from the sequence of subsections in this provision.

21 MR. ROTHFELD: Well, we of course don't
22 agree with the government on everything, but we do agree
23 that they are right about the sequence, for a number of
24 reasons. One is that it follows -- I think it's the
25 most natural reading of the statutory language that one

1 is required to register, travels in commerce, and
2 knowingly fails to register. It explains why Congress
3 put the interstate travel element second, which is
4 somewhat a peculiar thing to do otherwise.

5 And if that were not the case, it creates
6 the problem of what we we've been calling the "Lincoln
7 Tunnel baby." If someone were an infant traveling and
8 went through the Lincoln Tunnel from New York to New
9 Jersey, lived in New Jersey for the rest of his life,
10 committed a sex offense at age 50 -- if sequential
11 fulfillment of the elements was not necessary, that
12 person would be subject to criminal prosecution under
13 SORNA. So --

14 JUSTICE ALITO: Well, that makes -- that
15 makes a lot of sense. But you can get that from the
16 purpose of the statute, rather than from the sequence
17 in which these elements are listed. Is it -- is it
18 usually the case in a criminal statute that sets out
19 a number of element that they have to be satisfied in
20 some kind of temporal sequence? I'm not aware of that.

21 MR. ROTHFELD: I think sometimes it is and
22 sometimes it isn't. It's certainly not a universal rule
23 that it has to be. But, again, the language here makes
24 that a sensible rule.

25 JUSTICE SCALIA: Well, assuming it does

1 depend on the purpose of the statute, what would the
2 purpose -- it wouldn't cover his transportation as an
3 infant. What does he have to be, 20 years old?

4 MR. ROTHFELD: No. I --

5 JUSTICE SCALIA: Or 15 years old?

6 MR. ROTHFELD: Looking for --

7 JUSTICE SCALIA: Or is it 20 years before
8 the offense or 25 years before the offense? I guess
9 we could make it up, couldn't we?

10 MR. ROTHFELD: You would have to make it up,
11 but if one were to depart from the text of the statute,
12 which says "is required to register under SORNA." So,
13 necessarily, the travel took place after SORNA was
14 enacted.

15 And I think the statutory language disposes
16 of the case. There's no reason to look beyond that to
17 broader purposes. But if one does look to the purpose
18 of SORNA and what Congress had in mind, the interstate
19 travel requirement and attaching that the travel took
20 place after SORNA was enacted is what Congress wanted
21 to do. It accomplishes the purpose. Congress wrote
22 SORNA because it was concerned that there was divergent
23 approach to registrations that were taken by -- by States,
24 that they had inconsistent applications of registration
25 programs. This was creating loopholes that allowed sex

1 offenders who were unregistered not to register, and the
2 congressional response to that was to create a uniform
3 universal system of registration that it hoped all the
4 States would enact that would facilitate exchange of
5 information between the States and with the Federal
6 Government.

7 And the purpose of the SORNA criminal
8 provision in that context is that it was designed to
9 discourage people from traveling, unregistered sex
10 offenders from traveling, after SORNA was enacted to
11 evade the new SORNA registration requirements. For
12 that purpose, travel before SORNA is immaterial. It's
13 travel after SORNA is enacted that -- that brings into
14 effect the congressional purpose that they were trying
15 to accomplish. Congress wanted to keep out of the
16 channels of interstate commerce unregistered sex
17 offenders who were trying to evade the SORNA
18 requirements. That's necessarily prospective.

19 As to people who were unregistered sex
20 offenders who either had never traveled in interstate
21 commerce at all or who had traveled before SORNA was
22 enacted, they are identically situated for SORNA's
23 purposes. They are outside the system. They are not
24 registered. No one knows where they are. They are not
25 attempting to evade SORNA at that point. They are

1 subject to prosecution, not by the Federal Government,
2 but by the States under the new, more punitive regime
3 of criminal punishments that Congress tried to induce the
4 States to enact as part of the States' --

5 JUSTICE SCALIA: Well, which the States didn't
6 enact.

7 MR. ROTHFELD: And States have
8 generally -- States have not complied with SORNA.
9 Almost universally, they have not complied with SORNA.
10 But one thing many States have done is, in fact, enact
11 these new, more punitive criminal provisions for people
12 who have failed to register, as did, for example, Indiana,
13 the State in which Petitioner here was not registered.

14 JUSTICE ALITO: Well, let's compare two cases.
15 We have this case, where you have conviction, interstate
16 travel, SORNA takes effect, failure to register. We
17 change that. That's case A. Case B is just like this
18 case except the sequence is different. You have
19 conviction, SORNA takes effect, interstate travel,
20 failure to register.

21 Now, why would Congress have treated those
22 two situations differently?

23 MR. ROTHFELD: I think Congress had in
24 mind -- as I say, it was addressing a particular
25 problem. It was concerned that people were evading

1 registration requirements because the States had
2 different diverging systems, and it was allowing some
3 people in some States simply not to register, not
4 because necessarily they were evading State registration
5 requirements, because the State didn't require them
6 to register. States had very different systems as to
7 what offenses triggered registration requirements.

8 And so the congressional reaction was to
9 say: We want the States to enact these new, much more
10 comprehensive and intrusive and elaborate registration
11 requirements. And they are so -- so elaborate and
12 intrusive that the States are refusing to do it. But --
13 but that was the congressional goal, that the States
14 would enact these -- these regulatory regimes; people
15 would then register under them. Everybody was now going
16 to have to be registered, or they would be in violation of
17 some State law, State registration requirement.

18 And if people after that were trying to get
19 off the grid, disappear by moving in interstate
20 commerce, the SORNA criminal provisions would come into
21 effect at that point. For people who stayed put, people
22 who had committed a sex offense before SORNA was enacted
23 and just stayed there, they are identically situated, as I
24 said, to someone who never traveled in interstate
25 commerce at all, and they are subject to prosecution by

1 the States.

2 Clearly, Congress did not intend that it was
3 going to federalize the entire regime of prosecuting
4 people.

5 JUSTICE BREYER: Well, what is the basic
6 purpose of this statute? I'm having a hard time with
7 it. Is it -- is the purpose of the statute to try to
8 get a lot of people to register who haven't registered
9 at all? Or is the purpose of the statute to get the
10 people who had registered in one State and then moved,
11 and make sure they register in another State?

12 MR. ROTHFELD: I think that the purpose was
13 generally to encourage registration of sex offenders.
14 Now, of course, when -- when Congress wrote the statute,
15 as -- as has been pointed out, it was not apparent to
16 them that it was going to apply to people who had
17 committed sex offenses before SORNA was enacted at all.
18 That turned upon the Attorney General's subsequent
19 determination.

20 JUSTICE BREYER: No, I mean, if they are just
21 trying to get people to register in general, and they
22 are not particularly worried about travel, then they are
23 using this travel as a kind of jurisdictional hook. And
24 if they are using it as a jurisdictional hook, they'd
25 like to get everybody, as many as possible. That

1 argues against you.

2 MR. ROTHFELD: Well, two points --

3 JUSTICE BREYER: I -- I have a hard
4 time seeing just what they're aiming at.

5 MR. ROTHFELD: Well, it -- it's -- to -- to
6 be honest, I think it's not entirely clear that Congress
7 had anything specific in mind beyond a reaction to the
8 prior regime in which there were inconsistent approaches
9 being taken by the States.

10 JUSTICE BREYER: Basically, at the time they
11 passed this --

12 MR. ROTHFELD: At the time they --

13 JUSTICE BREYER: -- most States didn't
14 require registration.

15 MR. ROTHFELD: All States did require
16 registration of some sort or another, but they had
17 different registration systems and different
18 requirements in their registration systems. There
19 were -- there were inconsistencies in them.

20 The one thing which appears from the
21 legislative background of SORNA is that Congress was
22 concerned about loopholes in various State registration
23 regimes, and it wanted to have a much more
24 comprehensive, universal, uniform system of
25 registration. So to address your point

1 specifically about the jurisdictional hook, I think
2 there are two reactions to that.

3 One is, even if it were a jurisdictional
4 hook, it is an element of the offense. No one denies
5 that. It has to be interpreted as written. It says
6 interstate travel, as we read it, after SORNA was
7 enacted. So I think that answers the -- the question.

8 But -- but it -- but it was, I would add,
9 more than a jurisdictional hook, because Congress had in
10 mind this particular problem of -- of people who,
11 post-SORNA, were going to be evading these new, more
12 comprehensive requirements by simply disappearing. Not
13 that they were complying with State regimes which --
14 which didn't require them to register, but they would
15 simply cross State lines to vanish.

16 JUSTICE SOTOMAYOR: That begs the question.
17 They were concerned with people who had disappeared, but
18 why is it logical for them to be worried about people
19 who disappear prospectively as opposed to the people who
20 have already disappeared and have failed to -- that's
21 basically the -- the government's argument, which is:
22 One of the main purposes of the statute is to capture
23 those people who have disappeared. And so why limit it?

24 MR. ROTHFELD: Well, that's -- that's right.
25 The government's argument is -- is an appeal to what it

1 see as the gestalt of SORNA, rather than the statutory
2 language.

3 But I -- I -- but I think the answer to
4 your -- your question specifically, Justice Sotomayor,
5 is that they were -- they -- that when Congress passed
6 the statute, it -- it had in mind this division of
7 responsibility in -- in criminal enforcement. It --
8 it expected that the States, in order to comply
9 with SORNA, were going to enact these new and much
10 more -- more punitive criminal regimes to punish people
11 who did not register. And so far as SORNA was
12 concerned, people who never traveled in interstate
13 commerce and people who traveled in interstate commerce
14 before SORNA was enacted are identically situated.

15 JUSTICE SOTOMAYOR: The problem is that the
16 people who had traveled previously and failed to
17 register would no longer be subject to any -- either any
18 registration process or presumably any punishment
19 either, because they were no longer in the State in
20 which the conviction occurred, so any change in that
21 statute wouldn't affect them.

22 MR. ROTHFELD: Well, that -- under the --
23 the new regime that Congress anticipated would -- would
24 be put in place, every State would enact, would have in
25 place a -- a criminal punishment. And these were --

1 these States don't punish people simply who committed a
2 sex offense in that State and failed to register. They
3 require registration of sex offenders who committed sex
4 offenses anywhere.

5 JUSTICE KENNEDY: And do -- do they
6 generally require registration even if the offense was
7 committed before the registration act was passed in the
8 State?

9 MR. ROTHFELD: Yes, they do. So -- and in
10 that sense mirroring the current interpretation of SORNA
11 by the Attorney General.

12 JUSTICE KENNEDY: So what you're saying is
13 that, even under your interpretation, there is going to
14 be registration in at least one State?

15 MR. ROTHFELD: Absolutely.

16 JUSTICE BREYER: You say this at the
17 moment -- you may not know, but I think it would be
18 helpful. At the time this was passed, would you say
19 almost all States had some kind of registration act?

20 MR. ROTHFELD: Yes.

21 JUSTICE BREYER: Yes. Okay.

22 MR. ROTHFELD: All States --

23 JUSTICE BREYER: Now, thinking of that --
24 thinking of that set of registration acts in virtually
25 every State, did most of those or none of them or a few

1 of them or how many made it required that a person
2 register who had committed a crime, a sex crime, in a
3 different State and had moved to that State? Most, all
4 of them, none of them?

5 MR. ROTHFELD: I -- I believe that that
6 universally --

7 JUSTICE BREYER: Universally.

8 MR. ROTHFELD: -- they did not distinguish
9 based on the location of where the sex offense took
10 place. So --

11 JUSTICE BREYER: All right. So -- so,
12 therefore, every person who has committed a sex offense,
13 or almost everyone, would have been subject to a
14 requirement to move when he committed the offense and
15 would have been subject to a requirement to register
16 when he moved under some law. Now, Congress's purpose
17 then must have been just to try to get uniformity here.

18 MR. ROTHFELD: Well, the -- the various
19 registration -- State registration laws that existed
20 pre-SORNA, that -- all the States had registration
21 requirements, but -- but they differed in a number of
22 respects. Which sex offenses would trigger the
23 registration requirement, for example.

24 So -- so, there were people who -- who may
25 well have been sex offenders in -- in the broadest sense

1 under -- under the SORNA, a very broad definition, but
2 who were not required to register in the State in which
3 they -- they lived because that State's law did not
4 have -- list their offense as a triggering --

5 JUSTICE SCALIA: And would that be the case
6 after SORNA, that some States would have less extensive
7 coverage than others?

8 MR. ROTHFELD: It is possible after SORNA
9 that -- that States will enact criminal regimes that
10 don't -- that don't mirror the SORNA -- the SORNA
11 definition, but --

12 JUSTICE SCALIA: Well, unless that could be
13 the case, then I don't see what is achieved by -- why
14 you worry about somebody moving to another State in
15 order to evade the registration.

16 MR. ROTHFELD: Well, SORNA --

17 JUSTICE SCALIA: I mean, if the new State
18 requires you to register just as much as the old one,
19 what are you worried about?

20 MR. ROTHFELD: Well, under the SORNA regime
21 if the States all implemented SORNA as Congress
22 anticipated that they would, if they all enacted these
23 statutes, I think that there wouldn't be -- the only
24 concern would be that people would simply fail to
25 register, they would then disappear --

1 JUSTICE SCALIA: Fail to register entirely?

2 MR. ROTHFELD: -- altogether. That's right.

3 And I think that is what SORNA is directed at. SORNA is
4 directed at people -- they are now all subject to
5 registration requirements. SORNA is directed at the
6 concern that people simply won't register. And -- and
7 it's designed after SORNA goes into effect, and there are
8 these new requirements on the books. The people --

9 JUSTICE ALITO: Isn't the concern that the
10 State of conviction knows that an individual who has
11 been convicted of a sex offense has been released from
12 custody and, if that person is a resident of the State,
13 presumably knows that the person is likely to still be
14 in the State, but if the person moves to another State,
15 the State to which the person moves doesn't know that a
16 sex offender has moved into the State, and that's the
17 reason for the Federal law that imposes a penalty for
18 failing to register in the new State after having
19 traveled across interstate lines?

20 MR. ROTHFELD: That's -- that's -- that's
21 quite right. And SORNA addresses these problems by
22 saying, first of all, the States all have to -- have to
23 pool their information and exchange them.

24 Secondly, when the -- when the sex offender
25 moves from one State to another, he or she is required

1 to register in the new State, has to notify both -- both
2 the State and Federal authorities. So it is designed --
3 SORNA itself is designed to be a comprehensive response
4 to this problem, encouraging State cooperation. And
5 that is why if we are looking at the policy and -- and
6 just not paying attention to the language for the
7 moment, the focus was on post-SORNA activity, because
8 Congress has put in place this new regime which is
9 supposed to address the problem of missing sex
10 offenders. People who are taking steps after SORNA goes
11 into effect, you know, offenders, to evade their
12 registration requirements are now subject to these new,
13 more comprehensive Federal penalties as well as State
14 penalties.

15 JUSTICE SOTOMAYOR: I -- I think that I
16 remain a little bit confused by the question one of my
17 colleagues answered, and I'm not sure if this last
18 answer by you is helping me understand it, which is if
19 SORNA now -- if every State is supposed to pass
20 legislation which requires sex offenders who have been
21 convicted elsewhere and moved to their State to
22 register, why do you -- I think that's what you -- that
23 you answered affirmatively for Justice Kennedy, correct?
24 SORNA requires every State to pass laws that obligate
25 people who have been convicted in other States to

1 register, correct?

2 MR. ROTHFELD: That -- that's right.

3 JUSTICE SOTOMAYOR: All right. So why do you
4 need SORNA? Why can't those States that the individual
5 has moved to simply prosecute the person for a failure to
6 register? Why do you need SORNA?

7 MR. ROTHFELD: Those States could do that.
8 And I -- as to why we need SORNA, why Congress thought
9 that SORNA was a good idea, I -- I think there are a
10 couple of reasons. One is that there are Federal
11 offenders and Congress, I think, believed that it was a
12 special Federal responsibility to -- to make sure that
13 Federal sex offenders were registered. And in addition,
14 Congress regarded the problem of -- of unregistered sex
15 offenders as a Federal problem, and it was one that,
16 after SORNA was enacted and this new systematic regime
17 was put in place, was more appropriate for Federal
18 prosecution. But I think --

19 JUSTICE SCALIA: Perhaps Congress --

20 JUSTICE GINSBURG: Do you think part of it
21 is there was a -- SORNA requires a lot more information
22 than was required under the State statutes?

23 MR. ROTHFELD: Yes. SORNA is much more
24 expansive both in -- in the type of information that's
25 required and in the mechanism, in requiring in-person

1 registration by --

2 JUSTICE SCALIA: It's conceivable also that
3 Congress was -- was not confident that the States would
4 be as active in prosecuting violations as the Federal
5 Government would be.

6 MR. ROTHFELD: That -- that is -- that's
7 possible, too, and again that is a prospective focus.
8 And, of course, I -- my final point is that discussion of
9 the purpose I think illuminates this to some extent, but
10 the language itself is absolutely clear. There is no
11 reason to go beyond the plain text of the statute.

12 And if I can reserve the remainder of my
13 time.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 MR. ROTHFELD: Thank you, Mr. Chief Justice.

16 CHIEF JUSTICE ROBERTS: Mr. Gannon.

17 ORAL ARGUMENT OF CURTIS E. GANNON

18 ON BEHALF OF THE RESPONDENT

19 MR. GANNON: Mr. Chief Justice, and may it
20 please the Court:

21 Petitioner's offense under 18 U.S.C. 2250(a)
22 occurred when he failed to register as required by SORNA
23 well after SORNA was enacted. As Justice Ginsburg
24 elucidated, he does not dispute that the first paragraph
25 of SORNA can be triggered by a pre-SORNA conviction, and

1 adopting his construction of paragraph (2)(B) would
2 create a serious structural anomaly between the Federal
3 offenders, with whom there is no requirement that they
4 engage in any post-SORNA conduct other than the failure
5 to register, and the State sex offenders, who are the
6 majority of the missing sex offenders that Congress
7 intended to capture by enacting the new registration
8 regime and ensuring that there would be a serious
9 Federal penalty that would encourage offenders who had
10 used interstate travel to evade their registration
11 requirements to get back on the registration rolls.

12 CHIEF JUSTICE ROBERTS: Mr. -- Mr. Carr, was
13 in violation of the law the instant it was passed,
14 right?

15 MR. GANNON: We don't think he was in
16 violation of the law the instant it was passed for
17 purposes of the Ex Post Facto Clause; under cases like
18 Tranbarger and Samuels, we think that he did have a
19 reasonable period of time to comply with the new
20 obligation. This is a problem that would occur with all
21 sorts of Federal criminal statutes based on a status
22 that somebody was in at the time something was made
23 criminal.

24 In the -- in the case prohibiting possession
25 of handguns by persons who had been convicted of

1 misdemeanor crimes of domestic violence, that this Court
2 upheld that statute last year, when that statute came
3 into effect, if somebody had the relevant conviction on
4 the books and possessed a handgun, they would have been
5 guilty at the instant the statute came into effect, but
6 they would have been allowed a reasonable period to come
7 into compliance. That's the reasoning that the Court
8 used in Tranbarger and in Samuels; somebody who acquired
9 alcohol legally before a statutory prohibition provision
10 came into effect would be given a reasonable period of time
11 to divest himself of possession.

12 CHIEF JUSTICE ROBERTS: What's -- an obvious
13 question. What's the government's view on what a
14 reasonable time is?

15 MR. GANNON: Well, it's going to depend upon
16 the facts of the individual case, as the Tranbarger
17 Court recognized. In -- in the context of this
18 statute, where somebody is typically allowed only 3
19 business days to update their registration, we think it
20 would be a fairly short period. It's something that --
21 that -- that may depend on all sorts of circumstances.
22 If Petitioner -- or if a defendant, a sex offender, was
23 in the hospital for a long period of time and unable to
24 make it to the registry, that would provide him with an
25 -- an affirmative defense under the text of 2250(b).

1 And -- and so -- but we do think that this is a --

2 CHIEF JUSTICE ROBERTS: So -- but the
3 reasonable time question doesn't come up in your --
4 in your hypothetical.

5 MR. GANNON: In -- in --

6 CHIEF JUSTICE ROBERTS: First because
7 he's in the hospital and he has got a defense there,
8 so --

9 MR. GANNON: Well, that -- that's right,
10 and -- but I -- but we do think that it is a background
11 principle in -- in all of these cases that if somebody
12 is literally unable to avoid the criminal consequences
13 of their pre-enactment conduct, that that would raise the
14 concerns that the Ex Post Facto Clause is intended to
15 solve. And in cases like --

16 CHIEF JUSTICE ROBERTS: But no -- but as far
17 as a reasonable time goes, nobody's literally incapable
18 of doing it the same day the law passed.

19 MR. GANNON: Well, I --

20 CHIEF JUSTICE ROBERTS: Unless they meet one
21 of the other exceptions.

22 MR. GANNON: Well, this -- I mean, this is
23 -- that's -- we -- we think that somebody does need a
24 reasonable time to come into compliance. It doesn't
25 need to be a long time. But this is an issue that --

1 that exists in the statute completely separate from the
2 travel requirement here. The Federal offenders who
3 are -- who are covered by paragraph (2)(A) -- there's no
4 requirement, there's no actus reus for them under 2250,
5 other than the fact that they have a previous
6 conviction, which can be pre-SORNA.

7 JUSTICE SCALIA: Where -- where -- where?
8 (2)(A)? Which is where?

9 MR. GANNON: This is in 2250(a)(2)(A). It's
10 on page 1a of the government's appendix. And so
11 paragraph (2) is divided between (A) and (B) --

12 JUSTICE SCALIA: I see. "Or" --

13 MR. GANNON: (A) applies to sex offenders
14 who -- who are sex offenders by virtue of a conviction
15 under Federal or tribal law. Federal law --

16 JUSTICE SCALIA: And they don't have to
17 travel in interstate commerce.

18 MR. GANNON: They don't have to travel in
19 interstate commerce because of the "or" between (A) and
20 (B). The only thing they have to do --

21 JUSTICE SCALIA: Right.

22 MR. GANNON: -- is then knowingly fail to
23 register or update a registration as required by SORNA
24 in paragraph (3).

25 And so the reasonable grace period question

1 for purposes of the Ex Post Facto Clause here is not
2 something that the Court can -- can sidestep by deciding
3 that interstate travel needs to occur after the statute
4 was enacted. And, indeed, if somebody were traveling on
5 the day the statute was enacted, there would still be a
6 question about whether they had a reasonable time to
7 comply.

8 JUSTICE ALITO: Do you happen to know what
9 Indiana law provided at the time? Within what period of
10 time after moving to Indiana was the Respondent required
11 to -- rather, the Petitioner required to register?

12 MR. GANNON: It -- it was a few days at the
13 time. He was also required under Alabama law -- when he
14 registered and signed a sex offender registration form
15 in Alabama in 2004, it said that he was required to
16 notify the law enforcement authorities in the
17 jurisdiction of his new residence within 10 days of his
18 arrival there. And the Indiana law was -- was I believe
19 a period of 7 or 10 days at -- at the time.

20 JUSTICE ALITO: Well, should the reasonable
21 time -- should the period under SORNA, which isn't
22 specified by statute, be the same as the period under
23 the law of the State into which the person moves?

24 MR. GANNON: Well, the -- the period is
25 specified under -- under SORNA with -- when, once the

1 SORNA registration --

2 JUSTICE ALITO: Right.

3 MR. GANNON: -- regime comes into effect.

4 JUSTICE ALITO: Right.

5 MR. GANNON: And it does require in -- in
6 16913(c), that somebody update the registration after a
7 change in residence within 3 business days of -- of
8 coming to the new residence. And so we -- we do think
9 that that would be relevant in evaluating what would be
10 a reasonable time period to come into compliance here.
11 This is the sort of thing that -- that after the statute
12 already comes into effect, that it would -- it would require
13 somebody to comply within 3 days. If they moved a
14 year later, then -- then that should be a reasonable time
15 period to --

16 JUSTICE GINSBURG: Can you clarify --

17 JUSTICE SCALIA: How long ago --

18 JUSTICE GINSBURG: Can you clarify what you
19 mean by "the statute comes into effect"? Because if I
20 understand correctly, there's only one State and one
21 Indian tribe that are in compliance.

22 MR. GANNON: Well, that's -- that's partly
23 true, Justice Ginsburg. Since -- since the press
24 release that's cited in the briefs, another Indian tribe
25 has come into substantial compliance. But what's

1 important here is that that's just a question of whether
2 the State is in substantial compliance with SORNA's
3 requirements for purposes of receiving Federal funding
4 under -- under the Byrne program.

5 And here even if a State has not come into
6 substantial compliance -- and Indiana has not yet been
7 certified as having come into substantial compliance --
8 it still had a functioning sex offender registry that
9 would take most of the information that SORNA required
10 Petitioner to provide, things like his name, his
11 physical characteristics --

12 JUSTICE GINSBURG: But that would be what
13 their --

14 MR. GANNON: -- his -- his address --

15 JUSTICE GINSBURG: -- what their old law was.
16 It wouldn't be -- you have -- SORNA is in effect, but what
17 the State is implementing is the pre-SORNA State law, right?

18 MR. GANNON: It's true that, especially
19 before SORNA was enacted, that that's all the State was
20 doing, if the State has amended its law since then, and
21 Indiana did update its law in 2006.

22 But to the extent -- so the State may well
23 accept Congress's invitation to restructure its
24 registration system to match what SORNA requires, but
25 even when a State has not yet done that, there's no

1 doubt that someone like Petitioner can go in and
2 register. He was supposed to be registered, and, indeed,
3 after he was arrested in a -- in an incident in 2007, he
4 did register under Indiana law, and he provided the
5 information that Indiana was willing to take. And so --

6 CHIEF JUSTICE ROBERTS: What -- what do you
7 do with Mr. Rothfeld's hypothetical about someone who
8 travels in interstate commerce as a young child and,
9 20 years later, is covered by SORNA?

10 MR. GANNON: Well, we think that that's not
11 covered under the sequencing argument that we've made,
12 which -- which partakes of the purpose of the statute
13 that Justice Alito was talking about and -- and the
14 order in which the relevant acts occur.

15 As long as somebody is already a convicted
16 sex offender of the kind that SORNA requires to
17 register, and they are within the time period within
18 which SORNA would require them to register -- and
19 Petitioner here is a tier II sex offender, so he would
20 be required to register for 15 years after his 2004 sex
21 offense conviction. As long as he is within that period
22 when he engages in the travel, then we think that it's
23 within the heartland of what Congress was concerned
24 about, which is a sex offender who is engaging in
25 interstate travel --

1 CHIEF JUSTICE ROBERTS: I'm sorry. I'm not
2 -- I'm missing your answer to my question. The answer
3 to the child traveling and then 20 years later is --

4 MR. GANNON: Is --

5 CHIEF JUSTICE ROBERTS: -- is because it's
6 -- you have to require under SORNA before the travel?

7 MR. GANNON: It's -- no, it's -- you have to
8 have been convicted of a sex offense, because that --
9 that's what brings you within the category of persons --

10 JUSTICE SCALIA: I don't know where you get
11 that from. I can understand how you can say, which is
12 what Mr. Rothfeld says, that it has to follow the
13 requirement to register. That's the way the statute
14 reads: Whoever, one, is required to register, not
15 whoever has committed an offense that -- that would
16 later justify registration. It seems to me you are just
17 making up the -- the prior act that -- that triggers the
18 interstate travel requirement.

19 MR. GANNON: Well, I don't think that we are
20 making it up, Justice Scalia.

21 JUSTICE SCALIA: Well, what text do you base
22 it on? (1) says "is required to register," and the
23 position of the Petitioner is: After you are required
24 to register, you must travel in interstate commerce.
25 And you say: No, it's after you commit the offense that

1 you must travel in interstate. Where do you get that
2 from?

3 MR. GANNON: Well, we get that from the
4 facts -- from the context here, from the anomaly that
5 would be created, the structural anomaly about the
6 differential treatment between Federal and State sex
7 offenders. The fact that the purpose of the statute is
8 to recapture missing sex offenders, which are persons
9 who engaged in interstate travel to elude the
10 registration requirements that already apply to them as
11 sex offenders. And so we think that when Congress
12 invoked the -- its powers to regulate travel and
13 interstate commerce, in order to give that element
14 meaning, we think that it makes sense to apply it to
15 persons who already have the type of sex offense
16 convictions that SORNA requires them to register for.

17 CHIEF JUSTICE ROBERTS: So your answer to
18 Justice Scalia is that you don't get it from the
19 language? You get it from the anomaly; you get it from
20 the purpose.

21 MR. GANNON: We get it from the context.
22 That's right. And we know that the plain language of
23 the statute can't completely control this inquiry,
24 because the Congress changed the language that existed
25 earlier in the drafting process of the --

1 JUSTICE BREYER: Well, what about going back
2 to the purpose? There's a section on page 26 of the House
3 report where they go in some length to saying that the
4 purpose is this is going to help with 100,000 missing
5 people. Don't worry; if you can't remember, it doesn't
6 matter. What they say is there are 100,000 missing.
7 What they do is they travel, let's say, from Alabama to
8 California and they don't register. Now, this statute
9 is going to help with that.

10 Well, how does it help with that? They are
11 already supposed to register in California. And I
12 thought, well, maybe the way it helps with that is that
13 it imposes some new information requirements, so that
14 Alabama, if it were complying, would now have a lot of
15 information about the sex offender, and it would have an
16 obligation -- it could more easily track him down, or at
17 least California could or somebody could more easily
18 track him down, because he has to give information to
19 Alabama, and Alabama has a registry up.

20 Is there something like that in this?

21 MR. GANNON: Well, there is something like that,
22 but that's not all that's going on. On page 26 of the
23 House report --

24 JUSTICE BREYER: Yes.

25 MR. GANNON: -- that you're talking about,

1 Justice Breyer, it specifically says that sex offenders
2 who fail to comply will face felony criminal
3 prosecution. And this -- this was a way --

4 JUSTICE BREYER: Yes, but that's -- that's
5 true of everybody whether they have moved or not moved.

6 MR. GANNON: Well, it's --

7 JUSTICE BREYER: That is, what I'm --
8 the reason I brought up the other is because if this
9 is just a jurisdictional hook, I can see why Congress
10 might be trying to get as many people as they want
11 to register.

12 But this -- this also serves some purpose,
13 like we're going to make Alabama get some information,
14 makes it easier to catch these people, that purpose
15 wouldn't be served when the travel takes place before
16 this takes effect because Alabama wouldn't have kept the
17 information then.

18 MR. GANNON: Well, I think that Congress did
19 pass the statute for -- for multiple reasons in -- in
20 order to encourage there to be a more effective,
21 comprehensive nationwide registration scheme. And one
22 of the things that that required was -- anticipated, was
23 standardization among the States.

24 But it was also -- these -- Mr. Carr was
25 required to register both by the law of Alabama and

1 by the law of Indiana at the time he committed his
2 sex offense and when he moved from one State to the
3 other. Congress considered that type of regime as
4 being inadequate. Congress obviously thought that
5 the State violations that were occurring with
6 100,000 sex offenders who had eluded registration,
7 gone underground, was a problem they wanted to solve.

8 JUSTICE BREYER: Okay. So Congress passes
9 this statute. And how does it help specifically with
10 that?

11 MR. GANNON: Well, it -- it first of all
12 imposes a Federal registration requirement. So in --

13 JUSTICE BREYER: Okay. So the person who
14 hasn't registered in California --

15 MR. GANNON: -- in 16913 --

16 JUSTICE BREYER: He's afraid of the Feds.
17 He didn't -- he wasn't afraid of the California police,
18 but he's afraid of the Feds. Okay. I've got it. I've
19 got that. Any other thing?

20 MR. GANNON: It's -- it's not just that he's
21 afraid of the Feds when they can come with
22 prosecutorial powers under section 2250. It is also, as
23 you say, that there are several aspects of SORNA that
24 will encourage there to be much more cooperation among
25 jurisdictions in standardizing this information,

1 notifying different jurisdictions when somebody moves
2 from one to another --

3 JUSTICE BREYER: Okay. As far as I can read
4 that page, it seemed to me, insofar as what you've just said
5 is true, that would happen only after this statute is
6 passed. And, therefore, the fact that he had moved
7 before the statute is passed would not trigger the
8 cooperation. It might trigger the Fed prosecution part,
9 but it wouldn't trigger the cooperation part.

10 MR. GANNON: Well, that -- that's true, but
11 we already know that this is true without regard to
12 post-SORNA travel for persons who have Federal sex
13 offense convictions.

14 JUSTICE BREYER: The only reason I bring it
15 up is this is a very close case. That tends to cut
16 somewhat against you; namely, that the thing applies
17 full-force in terms of its purposes to people who travel
18 after, but it only applies as sort of this weak thing to
19 people who travel before.

20 MR. GANNON: Well, I think, to the extent
21 that the committee report identified 100,000 missing sex
22 offenders as the most significant enforcement problem in
23 the sex offender context, 10 years after every single
24 State and the Federal government had passed a panoply of
25 sex offender registration requirements, shows that they

1 were concerned about the persons who had fallen off the
2 sex offender registry rolls. And that this provision,
3 if it is -- if it is read to treat Federal and State sex
4 offenders more consistently, which is to require them
5 both -- to subject them both to potential Federal
6 prosecution if they knowingly fail to register after
7 SORNA comes into effect --

8 JUSTICE SCALIA: No, but -- but it doesn't,
9 because if you haven't been -- if you are convicted of a
10 Federal offense, you are automatically in, but if you
11 are convicted of a State offense, you're in only if you
12 travel in interstate commerce after that offense. So
13 you don't resolve the inconsistency between (A) and (B).
14 There is still going to be some inconsistency between
15 the two.

16 MR. GANNON: There is going to be some
17 inconsistency --

18 JUSTICE SCALIA: Exactly.

19 MR. GANNON: -- but we think that it's
20 dramatically lessened, and it's important in this
21 context to --

22 JUSTICE SCALIA: That -- that's a much less
23 powerful point. There is inconsistency between (A) and
24 (B), no matter what you do.

25 MR. GANNON: There is, but the vast majority

1 of the 100,000 sex offenders that were missing were people
2 who would have been convicted under State sex offenses.
3 And most of the -- most of the 705,000 registered sex
4 offenders in the country right now have been convicted
5 under -- under State provisions, rather than Federal --

6 JUSTICE BREYER: Have you been able to
7 find -- when in doubt about the purpose, let's turn to
8 the language. Is it the case that you found any other
9 statute, any other statute, where Congress phrased a
10 jurisdictional hook in the present tense?

11 MR. GANNON: I think that lots of
12 jurisdictional hooks referring to travel and interstate
13 commerce are phrased in present tense. There are --
14 there are a handful that -- that are -- are specifically
15 tailored and have extra language, like the one we cite
16 dealing with gambling devices that have been transported
17 in interstate commerce after the effective date of that
18 particular statute. But, for the most part, I think
19 that they are phrased in present tense and --

20 JUSTICE BREYER: Do you find anywhere where
21 they're both phrased in present tense and it was
22 pretty clear that Congress intended to catch activity
23 that was -- at least where the jurisdictional part took
24 place before the statute took effect? You find that
25 good an analogy anywhere?

1 MR. GANNON: I -- I'm not aware of -- of a
2 provision that's -- that's phrased like that --

3 CHIEF JUSTICE ROBERTS: I tried to --

4 MR. GANNON: -- where that -- where those
5 are the only things that are at issue.

6 CHIEF JUSTICE ROBERTS: I tried to find
7 one and -- and couldn't. I mean, looking up travels
8 in -- in the Code, and in each of those cases that I
9 found it's always -- it looks like it's -- it's linked
10 directly to the activity that's meant to be covered,
11 you know, traveling for the purpose of the -- the
12 activity that's against the law.

13 MR. GANNON: That's -- that's true. In
14 most instances in which Congress has an interstate
15 travel element, that's true. In some -- in
16 some cases like the -- the statute at issue in the
17 Trupin case about possession of -- of stolen goods
18 that have traveled in interstate commerce, that --
19 that's -- that's -- that's an invocation of --

20 JUSTICE SCALIA: Yes, where -- where it
21 means prior travel, it says so, use of a firearm that
22 has traveled in interstate commerce. They use the past
23 tense when they mean it.

24 MR. GANNON: In those cases in context,
25 I think it was easiest to say that when it has

1 traveled vis-à-vis the act that was in question there.
2 And -- and here -- neither side is contending that --
3 that the travel can happen after the failure to register
4 and somebody immediately then becomes guilty of the
5 offense.

6 We think that the sequencing requirement
7 makes sense on both ends, that somebody needs to have
8 the sex offense conviction before they travel, and then
9 they need to fail to register after they have -- they
10 have engaged in the travel, because that's the concern
11 that Congress was trying to get at, persons who were
12 able to use the fact of interstate travel to evade
13 registration.

14 And the reason, Mr. Chief Justice, why I
15 think that Congress didn't include a purpose requirement
16 there is because Congress didn't want sex offenders to
17 be able to take advantage of the fact that they had
18 another good reason to travel. If my employer transfers
19 me from one State to another, and then I take advantage
20 of that situation to go underground and not re-register,
21 that's one of the 100,000 missing sex offenders that
22 Congress was concerned about, even though I would have
23 had a good defense to the charge that I had traveled with
24 the purpose or for the purpose of evading sex offender
25 registration requirements.

1 Justice Sotomayor, I think you were asking a
2 question about -- about why the -- what the purpose
3 would be served here if States would already have the
4 underlying offense that would be made criminal by SORNA.
5 I think that there are a couple different answers to
6 that.

7 Mr. Rothfeld acknowledged that Congress may
8 well have intended there to be extra force that would
9 come from the -- from the Federal prosecution itself.
10 But separately I think it's important to note that --
11 that States were given time to comply with SORNA, to
12 come into substantial compliance with SORNA. And -- and
13 even though no State at this point has said that they
14 don't intend to come into compliance with SORNA,
15 Congress couldn't necessarily have expected States to
16 adopt the particular offense that they -- that
17 they were concerned about. And I think that -- that --
18 that here Congress did want to -- to cover that
19 situation.

20 One other factual point that's associated
21 with the -- the effectiveness there that was brought up
22 in the briefs and hasn't come up today is the question
23 of -- of when the prior Wetterling Act offenses were
24 repealed.

25 And I -- I -- in section 129 of SORNA, the

1 Wetterling Act offense was repealed effective 3
2 years after the date of SORNA's effective date, even
3 without regard to the 1-year extensions issued by the
4 Attorney General, notwithstanding a point in the
5 Petitioner's reply brief, simply because section 129
6 doesn't incorporate 124(B), which has the extension
7 provision for the Attorney General.

8 JUSTICE SOTOMAYOR: -- understand some of
9 the delay Congress may have in passing a law with
10 specifics about how things are done. Are you worried at
11 all under Lambert whether or not there might be a due
12 process violation in all the indeterminate provisions of
13 this law? Where do you -- yes, you're supposed to
14 register, but States don't have a place for you to
15 register, and now you are supposed to know that you are
16 supposed to register under the old systems, and you
17 don't know how much time to do it in.

18 MR. GANNON: Well, I -- I think here that
19 there -- the question of notice and knowledge has not
20 been an issue because it's --

21 JUSTICE SOTOMAYOR: I -- I --

22 MR. GANNON: And I think that's -- this --
23 one of the things you said is the States may not have a
24 place to register. And that's -- that's just not true.
25 Since -- since before 1996, every State has had a sex

1 offender registry.

2 JUSTICE SOTOMAYOR: Absolutely --

3 MR. GANNON: And -- and --

4 JUSTICE SOTOMAYOR: -- but they don't have a
5 SORNA place to register.

6 MR. GANNON: Well, it's the same place.

7 What SORNA requires is that you provide the following
8 types of information to the relevant officials that run
9 the sex offender registry for the jurisdiction. And
10 "jurisdiction" is defined to include the State.

11 And, so, in -- in -- in these cases, even if
12 the State hasn't changed the name on the door to SORNA
13 registration facility -- it's just sex offender
14 registration facility under, you know, Zachary's Law,
15 which is the name of the Indiana sex offender registration
16 law, as opposed to Megan's Law -- there is -- they are
17 still required by SORNA to register, which requires them
18 to give information to the relevant officials in the
19 relevant jurisdiction.

20 And the jurisdiction is there; the officials
21 are there. They are taking the information. As long as
22 the officials will take the information, the failure to
23 do that is a violation of 2250.

24 And there's one -- one other point that
25 Petitioner was making in the reply brief was that there

1 seemed to be some confusion about -- about whether there
2 was an offense under SORNA when States had not yet come
3 into compliance or whether that would have been an
4 offense only under the pre-SORNA Wetterling Act.

5 And -- and the reason that there isn't a
6 SORNA violation there, if -- if a State has not yet
7 decided to accept things like digital palm prints or
8 whatever the extra information is that SORNA would
9 require, the -- the defendant is still required to
10 provide that, what information the State will accept.
11 And the affirmative defense in 2250(b) would only be
12 applicable in circumstances where the State wouldn't
13 take that extra information.

14 So it's only those aspects of SORNA that are
15 above and beyond what the State will allow the offender
16 to do, that he's excused from complying with by the
17 affirmative defense, that it's uncontrollable circumstances
18 that he -- that he can't provide a DNA sample or a palm
19 print in a particular State that doesn't do that yet.
20 But as long as the State is taking the rest of the
21 information, he needs to give that.

22 And this is a case where Petitioner utterly
23 failed to give any of the information to Indiana once he
24 arrived there at the end of 2004 or beginning of 2005.
25 So, there's -- there's no dispute that the State would

1 have taken that information had he been in compliance
2 with that law. Once SORNA later came into effect, he
3 probably wouldn't have been in violation of SORNA at
4 that point.

5 But -- but that -- there's nothing unusual
6 about the fact that he could have engaged in pre-enactment
7 conduct that would have prevented him from being in
8 violation, just as the person convicted of a misdemeanor
9 possession -- misdemeanor crime of domestic violence, if
10 he doesn't possess a gun before the -- the new provision
11 in 922 comes into effect, then he hasn't committed the
12 offense. If somebody doesn't acquire the alcohol before
13 the statutory prohibition comes into effect that was an
14 issue in Samuels before that law came into effect, then
15 he hadn't committed the offense.

16 So, there's nothing unusual about saying
17 that he could have complied with SORNA effectively in
18 anticipation of its being enacted, even though it
19 didn't yet exist.

20 The -- the -- the question here is whether
21 he knowingly failed to register as required by SORNA
22 after it came into effect. And -- and we think that --
23 that -- that he did, because he had already engaged in
24 the interstate travel after he had been convicted of a
25 sex offense.

1 If there are no further questions, we would
2 urge the Court to affirm the Seventh Circuit --

3 JUSTICE BREYER: One last one. It should
4 help with a minor point. But -- but I take it, under the
5 statute, you have to register if you are a sex offender.
6 And that's true whether you've moved or not moved?

7 MR. GANNON: That's -- that's true under
8 Section 42 U.S.C. 16913.

9 JUSTICE BREYER: Yes.

10 MR. GANNON: That's true. The registration
11 requirement applies without regard --

12 JUSTICE BREYER: But it's a crime -- it's a
13 crime under the section we're talking about only if you
14 are both the person who had to register and you didn't
15 and you moved?

16 MR. GANNON: If you fall within (2)(B) --

17 JUSTICE BREYER: Yes. Okay.

18 MR. GANNON: -- the person who -- who has to --

19 JUSTICE BREYER: Everybody in the State has
20 to register if they meet that definition?

21 MR. GANNON: In order to -- to meet the --

22 JUSTICE BREYER: Moved or not?

23 MR. GANNON: To meet the registration
24 requirement of 16913, that's true. That's correct.

25 JUSTICE BREYER: Okay.

1 MR. GANNON: And -- and -- and, obviously,
2 that -- that makes sense in terms of implementing the
3 scheme, that if somebody registers beforehand, it makes
4 it much easier to catch them once they move afterwards.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Rothfeld, you have 4 minutes remaining.

7 REBUTTAL ARGUMENT OF CHARLES A. ROTHFELD

8 ON BEHALF OF THE PETITIONER

9 JUSTICE SCALIA: Mr. Rothfeld, I hate to eat
10 up any of your rebuttal time, but this is sort of by way
11 of unfinished business. Justice Alito asked three
12 questions at the beginning of this interesting exercise.
13 I think you only answered the first. I don't even
14 remember the third anymore.

15 (Laughter.)

16 JUSTICE SCALIA: But I was interested in the
17 second, which mentioned other provisions in this -- in
18 this very statute that -- that use the present tense.

19 MR. ROTHFELD: The -- those all appear in
20 the civil registration provision, not in the criminal
21 provision. And my answer to Justice Alito's question is
22 that we are not aware of any case in which the Congress
23 has used a present-tense verb in a criminal statute to
24 attach criminal consequences to conduct that took place
25 before the statute was enacted. And --

1 JUSTICE ALITO: But all of those provisions
2 refer now -- as a result of the Attorney General's
3 determination that pre-SORNA convictions qualify, all of
4 those provisions use the present tense to refer to
5 activities that can have taken place in the past.

6 MR. ROTHFELD: But at the time that
7 Congress --

8 JUSTICE ALITO: This very -- this very
9 statute. Isn't that correct?

10 MR. ROTHFELD: That is correct. At the time
11 that Congress wrote those civil provisions, this
12 statute, on its face, applied prospectively only. The
13 Attorney General had not yet retroactively applied it.
14 Congress specifically gave the Attorney General the
15 authority to apply it retroactively in defining which
16 offenders had to register. It did not give him any
17 authority to retroactively change the scope of the --

18 JUSTICE ALITO: No, but your main argument
19 is that "travels" is in the present tense, and that
20 means present and future. But there are provisions of
21 this very statute that use the present tense to refer to
22 past conduct. So why doesn't that knock the legs out
23 from under your textual argument?

24 MR. ROTHFELD: Well, the -- that's --
25 I'm not sure that I would say that's our principal

1 argument. That's one of our arguments, and the
2 argument which I think is dispositive. Given the way
3 that the Attorney General -- the Solicitor General
4 has presented the case relates to the first element
5 of the offense, which is that the action -- the
6 offender is required to register under SORNA, which, as
7 we have said, has to take place after SORNA is enacted.

8 I think Mr. Gannon candidly acknowledged
9 that basically, that has to be read to mean something
10 different. It has to be read to mean "is a sex
11 offender," and that is simply not a plausible reading of
12 the statute. Not only because of the plain words "is
13 required to register," but the provision of the offense
14 which addresses Federal sex offenders sets out three
15 elements as to them. As to a Federal sex offender, it
16 must be someone who is required to register.

17 JUSTICE ALITO: Well, Mr. Gannon may have
18 made an argument that's not helpful to his position,
19 but you can accept that the first provision means
20 exactly what it says: "is required to register." And
21 that takes effect on day when SORNA is enacted.

22 There's nothing in the statute that says
23 that those three events have to take place in -- in a
24 temporal sequence. It doesn't say "is required to
25 register and thereafter travels in interstate commerce."

1 It doesn't say that. In fact, an earlier version did
2 say that, and it was taken out, wasn't it?

3 MR. ROTHFELD: An earlier version said
4 "travels thereafter." I -- that was dropped, I would
5 suggest, as superfluous, because the present-tense
6 language encompasses that. But it -- it would not make
7 sense to say -- if one disregards the temporal sequence,
8 that brings back the Lincoln Tunnel baby. It would mean
9 that someone could have traveled as an infant, and that
10 satisfies the SORNA travel requirements.

11 JUSTICE ALITO: It doesn't if that results
12 from the aim of the statute, rather than the order in
13 which those elements are set out in the statute.

14 MR. ROTHFELD: But I'd suggest,
15 Justice Alito, that requires an extensive rewriting of
16 the language of the statute.

17 JUSTICE BREYER: It doesn't. He said, first
18 the crime has to take place, before the travel.

19 MR. ROTHFELD: And one has to -- one would
20 have to --

21 JUSTICE BREYER: And, moreover, there's a
22 statutory limitation, because after a certain period of
23 years, you don't have to register anymore. So the
24 hypotheticals about the infant and 20 years ago are out,
25 because the longest it could last is 15 years.

1 MR. ROTHFELD: But one has to --

2 JUSTICE BREYER: And then you wouldn't have
3 committed the crime as an infant, so there we are.
4 But it's still a long time, 15 years, I grant you.

5 MR. ROTHFELD: Well, and even so, one has to
6 read into that limitation as to where -- why it is that
7 there is that limit on -- on the --

8 JUSTICE SCALIA: You have to change the
9 language "is required to register" to "has committed
10 a" --

11 MR. ROTHFELD: "Has committed a sex
12 offense."

13 CHIEF JUSTICE ROBERTS: No, you don't have
14 to -- you don't have to do that. I guess my problem
15 with your argument -- you say, "is required to register
16 under SORNA." But you can be required to register under
17 SORNA before SORNA is enacted to the extent that SORNA
18 is retroactive. You ask someone: Why are you
19 registering? Well, SORNA tells me I -- I have to.

20 MR. ROTHFELD: Well, I'd suggest that that's
21 a peculiar reading of the term "is required to
22 register," that, as written, it seems to me as a present-
23 tense requirement. You are now currently required to
24 comply with the terms of the statute. It does not say:
25 You are required -- you are a sex offender within -- as

1 subsequently defined by SORNA. As Congress did expressly
2 say in the Federal offender provision in section (2)(A).

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 MR. ROTHFELD: Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: The case is
6 submitted.

7 (Whereupon, at 11:07 a.m., the case in the
8 above-entitled matter was submitted.)

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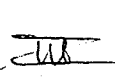
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: THOMAS CARR, Petitioner, v. UNITED STATES; and that these attached pages constitute the original transcript of the proceedings for the records of the Court.

Raymond R. Heer 

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